

SERVED: March 4, 1993

NTSB Order No. EA-3809

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 18th day of February, 1993

_____)	
JOSEPH M. DEL BALZO,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-11113
v.)	
)	
DONALD J. DYER,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Joyce Capps, rendered at the conclusion of an evidentiary hearing on September 13, 1990.¹ The law judge affirmed an order of the Administrator charging respondent with a violation of section 91.89(a)(1) of the Federal Aviation

¹An excerpt from the hearing transcript containing the initial decision is attached.

Regulations ("FAR," 14 C.F.R. Part 91).²

The Administrator's order, which was filed as the complaint, reads, in pertinent part:

"1. At all times material herein you were and are the holder of Airline Transport Certificate No. 1443831.
 2. On or about June 21, 1989, you acted as pilot in command of civil aircraft N218US, a Boeing B-737-200, identified as Piedmont Airlines^[3] Flight 1772, on a flight terminating at Jacksonville, North Carolina.
 3. During the course of the above flight, you executed right turns to the base leg and final approach to Albert Ellis Airport, Jacksonville, North Carolina.
 4. The above mentioned airport is an uncontrolled airport and requires all turns for aircraft approaching to land to be made to the left.
 As a result you violated Section 91.89(a)(1) of the Federal Aviation Regulations in that you operated an aircraft to or from an airport without an operating control tower and while approaching to land you failed to make all turns to the left."

In his answer, respondent admitted the first three allegations of the complaint and asserted an affirmative defense. He claimed that, due to the approach of threatening weather, he had to execute right turns to avoid the storm system 3 to 5 miles southeast of Ellis Airport and land safely. Although he did not formally declare an emergency, respondent maintains that, since the situation required emergency measures, his actions were

²Section 91.89(a)(1) (now 91.127(b)(1)) states:
"§ 91.89 Operation at airports without control towers.
 (a) Each person operating an aircraft to or from an airport without an operating control tower shall-
 (1) In the case of an airplane approaching to land, make all turns of that airplane to the left unless the airport displays approved light signals or visual markings indicating that turns should be made to the right, in which case the pilot shall make all turns to the right."

³USAir has since assumed control of Piedmont Airlines.

necessary for the safe operation of the flight. After listening to all the testimony, the law judge found that respondent was not justified in making a right hand approach to an uncontrolled airport in violation of section 91.89(a)(1). She then affirmed the Administrator's order.⁴

In support of his appeal respondent argues that, given the evidence presented, the law judge's decision is inherently incredible.⁵ Conversely, the Administrator maintains that the law judge's decision is supported by a preponderance of the evidence and was based on a reasonable credibility determination and evaluation of the witnesses' testimony.

After consideration of the briefs of the parties and the record below, the Board concludes that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order, as affirmed by the law judge.

Testimony from an FAA inspector and a USAir (then Piedmont) employee revealed that they observed Flight 1772 make a right turn approach, a fact that respondent does not dispute. The pivotal issue then becomes whether the evidence supports respondent's claim that storm clouds perilously near the airport posed a serious risk of imminent danger such that respondent had

⁴The Administrator did not seek to enforce the sanction because respondent timely filed an incident report with the National Aeronautics and Space Administration (NASA), as authorized by the Aviation Safety Reporting Program (ASRP).

⁵Respondent also argues that the law judge was not impartial. We have analyzed the record and determined that this claim is meritless.

The Administrator filed a reply in opposition.

to deviate from the correct landing procedure for an uncontrolled airport.

According to respondent, he had been forced to avoid bad weather during most of the flight. For each deviation, he requested and received clearance from the Wilmington Approach facility. He testified to the following scenario: As the aircraft approached Ellis Airport from the northwest, approximately 4 to 5 miles out, Air Traffic Control (ATC) cleared the flight for visual approach. At that time, respondent saw "huge cumulonimbus build-ups, ... rainfall and some virga⁶..." about 3 to 5 miles southeast of the airport. Then ATC, on its own initiative asked, "Would you like an overhead or a right entry?" Respondent claimed he then instructed the co-pilot to radio ATC, saying, "Tell him, in view of the weather, I would like a right entry," to which, according to respondent, ATC replied, "Roger. You're cleared for a visual approach." At this point, he executed a right hand approach and landed. See Transcript (Tr.) at 123-25.

It is respondent's position that the law judge's decision is inconsistent with the facts presented. A review of the record, however, reveals that after evaluating the testimony and evidence adduced at the hearing, the law judge simply accepted the version of events relayed by the Administrator's witnesses. Various inconsistencies in the witnesses' testimony, of necessity,

⁶Virga is precipitation that evaporates before reaching the ground.

required the law judge to make a credibility finding. For example, one witness who was an aviation safety inspector and former air traffic control specialist opined that it would have been very unlikely for Wilmington ATC to have cleared respondent to make right turns on a visual approach to an uncontrolled airport, as it would have been contrary to the Controller's Handbook and not within the controller's responsibility.⁷ He also stated that there was no reason why the aircraft could not have made a left downwind approach. Testimony elicited from respondent's own expert witness revealed that ATC does not have the authority to approve right hand turns in this situation.⁸

Respondent maintains that the evidence supports his assertion that if he had flown a left hand pattern, the aircraft

⁷This witness testified as follows:

Q. "Do air traffic control specialists clear pilots to make right hand turns to uncontrolled fields after issuing and having received acceptance of a visual approach?

A. No, sir, they do not.

Q. Would you elaborate on that, please?

A. If such a thing would happen, it would be contrary [to] the provisions of the Controller's Handbook from an approach control standpoint such as a situation we're dealing with here from Wilmington.

Wilmington would have no VFR responsibility for the Albert Ellis Airport at all. They would be concerned with the instrument arrivals and departures and they would only be involved in a separation of IFR traffic from the IFR separation standpoint. They would have no control, they would exercise no other controller jurisdiction."

Tr. at 169.

⁸Tr. at 155.

would have come dangerously close to thunderstorm clouds.⁹ Both the FAA inspector and the USAir employee, eyewitnesses to the landing, stated, however, that the weather at the airport was clear. Respondent argues that these witnesses did not have the unobstructed view of the surrounding area that he did from the cockpit of the aircraft. Admittedly, these witnesses were looking toward the northwest, observing the aircraft as it approached and landed. Yet, the inspector indicated that he had looked in all directions around the airport and saw no storm clouds.¹⁰ Moreover, data detailing the weather observed at Ellis and surrounding airports does not, as respondent suggests, render the law judge's conclusion inherently incredible.¹¹

In sum, the law judge's decision in this case hinged on a determination of witness credibility. Since respondent has not shown that the law judge's determinations were arbitrary or capricious, they will be upheld. See Administrator v. Smith, 5 NTSB 1560, 1563 (1986). In addition, given the law judge's resolution of the conflicting testimony and evidence on weather

⁹The co-pilot corroborated these weather observations.

¹⁰He said there was "very good visibility."

¹¹The weather report for Ellis Airport made no mention of cumulonimbus clouds on June 21, 1989. At approximately 2:00 p.m. (the time the aircraft landed), the weather observation was scattered clouds at 3,500 feet, broken clouds at 8,000 feet, estimated, visibility of 7 miles with no obstruction.

At approximately the same time, Wilmington Airport (about 6.5 nautical miles southwest of Ellis) reported cumulonimbus clouds moving to the northeast, while New River Marine Corps Station (approximately 11 nautical miles southeast of Ellis) reported cumulonimbus clouds northeast and southwest moving northwest.

conditions, we agree with her judgment that an emergency did not exist and that respondent, therefore, was not justified in deviating from the mandated traffic pattern. See Administrator v. Dunahee, 5 NTSB 2064, 2066 (1987).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's order and the initial decision are affirmed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.